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SUBJECT: 2007 U.S.-China Legal Exchange

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11. (SBU) Summary: The Department of Commerce and the Ministry of Commerce held the 2007 U.S.-China Legal Exchange in Xi'an, Beijing, and Shanghai from October 22-27. The program consisted of U.S. and Chinese presentations on each country's inbound investment and trade secrets regimes as well as open discussion on both topics. The Chinese audience members were very engaged in the discussion and sought additional information on the U.S. investment regime and practical steps that companies can take to protect their trade secrets in the United States. Government officials from both sides agreed to hold the 2008 Legal Exchange program in the United States.

2007 U.S-China Legal Exchange

12. (U) During the week of October 22, the U.S. Department of Commerce and China's Ministry of Commerce (MOFCOM) held the 2007 U.S.-China Legal Exchange, a cooperative exchange program under Commercial Law Working Group of the U.S.-China Joint Commission on Commerce and Trade. Department of Commerce General Counsel John Sullivan led a delegation of U.S. commercial law experts to discuss the U.S. legal regimes governing inbound foreign investment and the protection of trade secrets. The delegation was composed of General Counsel Robert Hoyt, Department of the Treasury; Deputy General Counsel David Bowsher, Department of Commerce; Attorney-Advisor Joel Blank, Department of Commerce; and Rex Hockaday, Senior Corporate Counsel, Caterpillar, Inc. MOFCOM hosted programs in Xi'an, Beijing, and Shanghai and recruited local professors, government officials, and attorneys to engage on both topics.

CFIUS Process and Investment Policies

13. (U) Mr. Hoyt provided an overview of the legal regime governing investment, particularly focusing on the framework that guides national security reviews conducted by the Committee on Foreign Investment in the United States (CFIUS). Mr. Hoyt stressed that CFIUS provides a voluntary review mechanism that looks only at transaction-specific national security concerns and does not have the authority to consider

other issues, such as economic security or broad industrial policies. Mr. Bowsher provided additional information on how the federal system of government in the United States impacts the U.S. investment regime as well as on the Department's Invest in America Initiative. Mr. Hockaday detailed the legal framework governing trade secrets in the United States and identified practical steps that companies can take to protect those secrets under that legal framework.

¶4. (SBU) Chinese professors and attorneys in each city presented information on China's investment and trade secrets regimes. Their overviews on investment identified a lack of clarity on the relationship between China's 2006 Regulations on the Merger and Acquisition of Domestic Companies by Foreign Investors (M&A Regulations) - administered by MOFCOM - and the recently promulgated Anti-Monopoly Law (AML), which will go into effect on August 1, 2008. Under the M&A Regulations, all mergers with and acquisitions by foreign entities must be reviewed and cleared by MOFCOM, which analyzes whether such transactions will impact the national economic security of China. Under the AML, the antitrust authority (not yet established) will review similar mergers and acquisitions and analyze whether such transaction will impact national security.

¶5. (SBU) The Chinese presenters noted that neither the M&A Regulations nor the AML define the scope of the respective reviews for national economic security and national security. U.S. presenters noted that this lack of clarity on the scope of each review and

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the relationship between the reviews and the reviewing authorities creates confusion when foreign investors are considering entering the Chinese market. China should work to clarify these reviews in order to make its investment regime more manageable. In addition, neither legal authority establishes a time frame for review, which reduces the certainty of investing in China.

Trade Secrets

¶6. (SBU) The Chinese also presented on China's legal regime protecting trade secrets. China does not have a single law or regulation establishing the legal framework for trade secrets; instead, China protects trade secrets through a web of laws on contracts, unfair competition, and labor standards. As a result of this approach the system remains confusing and does not establish a uniform definition or consistent practices on trade secrets. The Chinese presenters suggested that, for China to have a truly leading regime on trade secrets, China develop a single law that defines trade secrets and eliminates the lack of uniformity.

¶7. (SBU) The Chinese audience was very engaged and seemed to benefit from the information exchange, suggesting the importance of continued dialogue on both of the Legal Exchange's topics and on the rule of law in general. Regarding investment, the audience was interested in better understanding the CFIUS review process and the factors that CFIUS considers when analyzing a transaction. Mr. Hoyt stated that the factors considered vary from transaction to transaction and that he could not discuss specific examples, but that the Treasury Department will issue guidance on the review process in April.

¶8. (U) Mr. Bowsher extended an invitation to host a Chinese delegation in 2008 for the next Legal Exchange and suggested that coordination begin early next year. The Chinese agreed that we should continue the program next year and look forward to visiting the United States.

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